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# In the Supreme Court of the United States

No. 232.
OCTOBER TERM, 1968.

RETAIL STORE EMPLOYEES UNION LOCAL 954,
*Petitioner,*
v.
LANE DRUG COMPANY, A DIVISION OF A. C. ISRAEL COMMODITY CORPORATION, *et al.*,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

## RESPONDENTS' BRIEF IN OPPOSITION.

LEONARD LANE,
ALAN ARNOLD,
LANE, KROTINGER, SANTORA, STONE & PURDY,
300 Chester-12th Building,
Cleveland, Ohio,
*Attorneys for Respondents.*

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

## RESPONDENTS' BRIEF IN OPPOSITION.

## QUESTIONS PRESENTED.

1. When the union's petition for certiorari in an unfair labor practice case reveals, and when the brief of the National Labor Relations Board in opposition to the union's petition concedes that the issue before this Court is primarily an issue of fact, and that the record raises no substantial or unique legal question, should the writ of certiorari be issued?

2. When the court of appeals concludes that there is no substantial evidence on the whole record establishing bad faith by the employer in rejecting a demand to bargain based on authorization cards, and when said court of appeals further concludes that the substantial

evidence on the whole record affirmatively shows good-faith doubt that the union possessed cards from a majority of employees in an appropriate unit, should such decision be reviewed by this Court?

3. Should the court of appeals, in reviewing an order to bargain (without the Board election which the employer requested) consider only such substantial evidence as supports the Board order and ignore substantial evidence on the whole record which militates against enforcement of the order?

## SUMMARY OF ARGUMENT.

In arguing the facts as the basis for its petition, the union, which had been favored by a bargaining order of the National Labor Relations Board (160 N.L.R.B. 1147; J.A. 605-09) based on a claimed majority of authorization cards, would prefer that the court of appeals have ignored certain "separate factors" (Brief of Petitioner, p. 2) which militate against the order. These factors, however, are the basis of the Board's opposition to this petition for certiorari; for the Board admits that the court below was presented with "various factual considerations which provide some support for the court's conclusion" (Brief of Board, p. 10).

Thus, even the union and the Board cannot agree as to the weight to be given the various facts in the extensive record before the court below, and the petitioner is left with an argument based on fact and not on law. Such petition is not appropriate for granting the writ of certiorari.

Among the *undisputed facts* before the court of appeals, which the petitioner regards as mere "separate factors," are the following:

1. The only valid demand to bargain made by the union was, according to the Board's findings, based on a razor-thin majority of one card acquired less than one day prior to the demand (160 N.L.R.B. at 1149-50; J.A. 608).

2. Such alleged majority was determined only through the inclusion and exclusion of various potential members of the bargaining unit on grounds which the employer could and did, in good faith, dispute (160 N.L.R.B. at 1149, 1165-73; J.A. 567-83, 607-08).

3. The same union had presented a nearly-identical demand to the same employer at a previous time, and the ensuing Board-supervised election yielded a rejection of the union by a vote of 154 to 28 (J.A. 335-36, 528; Resp. Ex. G-3).

4. Prior to rejecting the union's demands herein, the employer was presented with evidence which indicated that a majority of employees did not favor the union (J.A. 431-32, 435).

5. The union admitted its reluctance, from the very inception of the organizational campaign, to submit to an election supervised by the Board (J.A. 96).

6. The union admittedly made an invalid demand to bargain and an invalid charge of unfair labor practices just a few days after the first organizational meeting (160 N.L.R.B. at 1150; J.A. 608).

7. The union presented unclear and inconsistent bargaining-unit descriptions in conjunction with its various bargaining demands (G.C. Exs. 1-A, 1-C, 1-E, 1-U, 6; J.A. 2-12, 36-37, 500).

In the three card check cases in which this Court denied certiorari during the October 1967 term (*Preston*

*Products Co. v. NLRB*, 88 Sup. Ct. 2058 (1968); *Bryant Chucking Grinder Co. v. NLRB*, 88 Sup. Ct. 2055 (1968); *NLRB v. Crawford Mfg. Co.*, 88 Sup. Ct. 1408 (1968)), such strong mitigating factors were not present, and the issues were primarily legal rather than factual. The opposite is true here.

Moreover, the decision below being primarily factual in nature, the criterion (Sup. Ct. Rule 19 par. 1(b)) that it be in conflict with the decisions of other courts of appeals cannot be met.

The court below was not bound to ignore the above facts, which in themselves reveal that this case does not present a clear-cut issue on the establishment of bargaining rights by means of authorization cards. Rather, these facts show that the issues herein are primarily evidentiary; that the court below did not violate the substantial evidence rule in considering them; and that the petition for the writ of certiorari therefore should be denied.

## STATEMENT OF THE CASE.

Petitioner (Retail Store Employees' Union) has set forth an incomplete factual statement. Such statement reveals two assumptions, both of which unquestionably are incorrect, namely (1) that the petitioner may assess the decision of the court below solely on the basis of such evidence as supports the order of the National Labor Relations Board; [1] and (2) that petitioner may, in assessing that decision, disregard testimony which militates against the Board's order.

This selective evidentiary presentation seems to be part of an overall effort to have this Court review *de novo* all of the evidence on the record, since petitioner

[1] Hereinafter referred to as the "Board."

disagrees with the conclusions reached by the court of appeals. The following facts, however, all of which are undisputed and supported by the findings of the Trial Examiner and/or the Board, show that the court of appeals, in denying enforcement as to a portion of the Board's order, did not misconstrue its role in reviewing the whole record, and that the petitioner's quarrel with the court below is no more than a disagreement as to the effect of the evidence.

Throughout the relevant period, the respondents[2] operated an integrated chain of retail drug stores in Toledo, Ohio, and in the nearby municipalities of Bowling Green, Oregon, and Sylvania. Beginning on May 10, 1965, the employer began hiring additional pharmacists, including two pharmacists (G.C. Ex. 11; J.A. 504-05) to be stationed in another store which shortly thereafter began operations in Fostoria, Ohio.[3]

The very first manifestation of organizational activity on the part of the pharmacists in respondents' stores was a meeting conducted late on the evening of April 28-29, 1965 (Wednesday night and Thursday morning) (J.A. 238-239). One of the so-called pharmacist-assistant managers had been invited and attended (160 N.L.R.B. at 1156; J.A. 544), and no one can be certain as to how many pharmacists were present (J.A. 375). Prior to any request

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[2] Sometimes referred to hereinafter as the "employers" or the "employer." Either a singular or a plural reference is correct, since the respondents are, for purposes of section 2(2), (6), (7) of the National Labor Relations Act, as amended (hereinafter referred to as the "Act"), 49 Stat. 450 (1935), 29 U.S.C. sec. 152(2), (6) (7) (1964), a single employer engaged in commerce (G.C. Ex. 4; J.A. 498).

[3] Fostoria, like the three communities mentioned in the text, might be considered part of the Greater Toledo area (160 N.L.R.B. at 1151, 1166 n. 40; G.C. Ex. 4; J.A. 69-70, 531-32, 565 n. 40).

that authorization cards be signed, a union organizer proceeded to tell the pharmacists present that "the Union did not intend to follow the election route to become the bargaining representative of the pharmacists" (J.A. 96).

After business hours on the very day the meeting ended, the union dispatched a telegram (G.C. Ex. 5; J.A. 35, 499) directed to only one of the corporate respondents, Lane Drug Company, which operated only those stores located within the City of Toledo (160 N.L.R.B. at 1151; J.A. 531). The telegram demanded recognition.

The Board found that demand to be invalid (160 N.L.R.B. at 1149-50; J.A. 608); since, at the time made, even adopting the Board's theory as to the size of the appropriate unit, the union did not possess cards from a majority of the pharmacists.[4]

When Vice-President Dr. George Kaye received the invalid demand on Friday morning, April 30, both he and Store Supervisor Willis found the wording of the demand reminiscent of a nearly-identical claim (Resp. Ex. G-1; J.A. 335-36, 526) made by the same union to the same company in 1954 (J.A. 435). The Board subsequently certified an election in which the union received only 28 out of 182 votes cast (Resp. Ex. G-3; J.A. 528).

Dr. Kaye, on the basis of this bargaining history, had some initial doubts as to the validity of the claim of majority representation. He therefore instructed his two supervisors to talk to the pharmacists and to determine the extent of union sentiment (J.A. 469-70, 480-81).

On the basis of uncontradicted testimony, the court below found (*Lane Drug Co. v. NLRB*, 391 F. 2d 812, 818

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[4] In fact, at the time of the demand, the union had no idea how many cards it possessed (J.A. 83, 97).

and n. 6 (6th Cir. 1968)) that Supervisor Willis, in a non-coercive manner (J.A. 431),[5] determined that there was no strong pro-union sentiment, and this information was reported back to Dr. Kaye. Willis reported such conversations as that of pharmacist David Yarnell, who indicated that "he didn't think many of the pharmacists were interested in the union, the ones he talked to." Pharmacists Langdon and Newhard said basically the same thing (J.A. 432-33).[6]

On Monday, May 3, 1965, without awaiting any reply to its invalid demand, and after the intervention of only one weekend from the receipt of the demand, the union filed an unfair labor practice charge with the Board (G.C. Ex. 1-A; J.A. 2). At that time, as the Board ultimately found (160 N.L.R.B. at 1149-50; J.A. 608), the union still did not possess cards from a majority. And this charge, like the demand, was directed only against respondent Lane Drug Company. Further, the charge indicated a bargaining unit of 25 pharmacists, which is perfectly consistent with the number of employees in the stores operated by that single employer.

On Tuesday, May 4, 1965, the union dispatched still another demand to respondent Lane Drug Company only (G.C. Ex. 6; J.A. 36, 500). This demand, like the ensuing complaint and the various unfair labor practice charges,

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[5] Willis testified:

"I just talked with the people, managers and the pharmacists and different ones in the store. * * * I just more or less listened to what they had to say about it, got their opinions. I mean, I didn't really do any questioning as to what took place" (J.A. 431).

[6] There was also the commentary of pharmacist Robert P. Abell who said "he was scared to death— * * * that he was actually afraid. He didn't sleep for a night or two for worrying about this thing" (J.A. 435).

caused considerable confusion, since it described a different geographical area and raised some doubt as to the precise bargaining unit which would be included. Precision, of course, was of ultimate importance when the Board found that, on the basis of the inclusion and the exclusion of various pharmacists on legally disputable grounds, the union had acquired a razor-thin majority of one card at some point in time prior to the May 4 demand.

On May 10, 1965, the respondents hired the first of two pharmacists for the Fostoria, Ohio store (160 N.L.R.B. at 1170; J.A. 577, table 2 n.i.). On May 12, 1965, the respondents rejected the union's demand because "they have reason to doubt your majority status, as claimed" (G.C. Ex. 7; J.A. 501).

On the same date, Lane Drug Company, who was clearly the only respondent to which a charge had been directed, filed a petition (G.C. Ex. 2-A; J.A. 490-91) for a Board-supervised election, to be conducted among the approximately 25 pharmacists in the stores of that employer.

On May 15, another pharmacist was hired. Two days later, on May 17, respondents employed the second pharmacist for the Fostoria drug store (160 N.L.R.B. at 1170; J.A. 577, table 2 n.i.); and on the next day, May 18, as expected and announced long before, the Fostoria store was opened (160 N.L.R.B. at 1166 n.40; J.A. 565 n.40).

These new employees constituted genuine accretion to what would have been the unit of employees eligible to vote in an election, and the Trial Examiner so admitted (160 N.L.R.B. at 1170; J.A. 577, table 2 n.i.). Therefore, respondent Lane Drug Company requested withdrawal of its more limited petition for an election (G.C. Ex. 2-C; J.A. 494).

On June 11, the union added still another description of the unit when it filed an amended [7] unfair practice charge against *each* of the respondents, now indicating a unit of "30 pharmacists in the vicinity of Toledo, Ohio, and in Bowling Green, Ohio" (G.C. Ex. 1-C; J.A. 3-5). The Board took up this description when it issued its complaint on June 17, 1965 (G.C. Ex. 1-C par. 9; J.A. 3-12).

Having withdrawn its first election petition on the basis of the attempts of the union to broaden the bargaining unit described, all of the employers joined in an election petition for the approximately 40 pharmacists involved in the combined operations in Toledo, Bowling Green, Oregon, Sylvania, and Fostoria (G.C. Ex. 2-B; J.A. 492-93). The Director of the Board's Eighth Regional office denied this petition on August 24, on the grounds that a complaint already had issued and that "the Union has not demanded recognition for the employees of Lane's of Fostoria, Inc. * * *" (G.C. Ex. 2-D; J.A. 494-95).

The Board did not agree with all of the fact findings of the Trial Examiner. One of the more significant areas of disagreement was in the exclusion of two pharmacists from the bargaining unit proposed by the union and General Counsel (160 N.L.R.B. at 1149; J.A. 607-08). It was this disagreement which led to the Board's finding that the first demand to bargain was invalid but that the bargaining order was justified on the ground that the union obtained *a majority of one card* just *one day prior* to the second demand. This razor-thin majority, plus the alleged

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[7] The union apparently was concerned about the use of an invalid demand and charge, followed by an attempt to "renew" the invalid demand and to "amend" the invalid charge. A letter of June 27, 1965 alleges that the union's demand "has remained in effect at all times since it was initially made * * *" (G.C. Ex. 1-U, Ex. C; J.A. 36-37).

violations of section 8(a)(1) and (3), was the sole basis for the order to bargain.

The court below ruled that the finding of section 8(a)(5) violation was not supported by substantial evidence on the whole record (391 F.2d at 818-20). In so doing, the court weighed all of the evidence, including such facts, eliminated from the petitioner's statement of the case, which militate against the Board's findings of bad faith, and which indicate that General Counsel did not sustain his burden of proving bad faith. In fact, the court below, after reviewing the whole record, determined that the substantial evidence affirmatively shows good faith.

## REASONS FOR DENYING THE PETITION.

### I. This Court Decided Only Last Term That Decisions Such as That of the Court Below Do Not Justify Allowance of the Writ.

The Board opposes the union's petition for certiorari on the ground, *inter alia*, that "the issue of the Companies' good faith in rejecting the Union's request for recognition is essentially evidentiary" (Brief of Board, p. 9). The Board concedes that, "despite reservations about the soundness of the Court's evaluation of the substantiality of the evidence on the good-faith doubt issue, the Board recognizes the presence here of various factual considerations which provide some support for the court's conclusion" (Brief of Board, p. 10). Thus, "the Board does not view this case as an appropriate one in which to seek again review of this issue by this Court" (*ibid.*).

The last reference is to three cases in which petitions for certiorari were denied last term. *International Union, UAW v. NLRB*, 392 F.2d 801 (D.C. Cir. 1967), *cert. denied*, sub nom. *Preston Products Co. v. NLRB*, 88 Sup.

Ct. 2058 (1968); *Bryant Chucking Grinder Co. v. NLRB*, 389 F.2d 565 (2d Cir. 1967), *cert. denied*, 88 Sup. Ct. 2055 (1968); *NLRB v. Crawford Mfg. Co.*, 386 F.2d 367 (4th Cir. 1967), *cert. denied*, 88 Sup. Ct. 1408 (1968). In all three, the issues of good faith considered by the courts of appeals were far less ambiguous than they are here.

In the *Bryant* case, for example, at the time of the first demand, the union had a clear majority of 34 cards. 389 F.2d at 566. In the *Crawford* case, at the time of its first demand, the union had received cards signed by 100 out of the 172 production and maintenance employees in the appropriate unit, 386 F.2d at 369. The plurality was similarly large in *Preston Products Company*, 392 F.2d at 804.

In its attempt to distinguish those cases, the union implies that the case at bar presents a clear legal issue respecting good faith in card-check cases (Brief of Petitioner, p. 10). As the Board points out, this assumption is not correct.

For, in its petition, the union argues facts, not law. In the union's efforts to present a picture of legal clarity, it has been forced to delete from its statement all of the substantial evidence which militates against the Board's finding of bad faith.

Most of these factual elements, which the union attempts to demean by placing upon them the label of "separate factors," were not even present in the three cases in which certiorari was denied by this Court. Such facts make this case much less worthy of review than the cited cases.

In other words, as the Board admits, the questions of good faith set before the court below were singularly factual in nature, and thus the petitioner asks this Court

to perform the function assigned to the court of appeals of reviewing the whole record *de novo*.

The nature of the petition herein does indeed render the case "different from the three" cases decided last term (Brief of Petitioner, p. 10). But the difference favors the denial of the union's petition for certiorari.

## II. The Court Below Reviewed Substantial Evidence on the Whole Record, Including the "Separate Factors" Referred to by the Petitioner Which Support the Decision Below.

The Board admits, in opposing certiorari, that there are "various factual considerations which provide some support for the court's conclusion" below (Brief of Board, p. 10). These "various factors" are so pervasive and so substantial that the union attempts to separate them as isolated evidence.

Such evidence, however, cannot be ignored. It must be and was reviewed by the court below along with the evidence which might tend to support the Board's conclusion. When all the evidence was weighed, it became apparent that the Board is correct when it tells this Court that the decision below does not present a legal issue particularly relevant to the question of authorization cards and their good-faith rejection.

Petitioner, however, being unsatisfied with the result, asks this Court to perform the duty of a court of original jurisdiction. Such is not the function of the writ of certiorari.

But, in an attempt to overcome this inherent obstacle to review by this Court, the petitioner attempts to phrase its second question in such a way as to make it appear that the General Counsel *undisputedly* established substantial proof of bad faith, and that the court below over-

turned a portion of the Board's order on the basis of isolated bits of evidence outside the main stream of General Counsel's case, which the petitioner calls "separate factors" (Brief of Petitioners, p. 2).

The following capsulation of these factors should sufficiently reveal that there is *no clear legal issue* of bad faith before the Court.

1. An earlier demand to bargain similarly based on authorization cards submitted by the same union to a member of the same employer group, followed by a Board-supervised election in which the union was rejected by a vote of 154 to 28;

2. The stated reluctance of the union organizer, from the beginning of the organizational campaign, to submit to a Board-supervised election;

3. The unseemly hurry of the union to make a bargaining demand and to charge the employer with bad faith in rejecting that demand only one business day after its receipt by the employer;

4. The lack of clarity by the union in indicating the particular employer unit toward which its bargaining demand was directed;

5. The inclusion and exclusion of certain pharmacists, and particularly pharmacist-managers and assistant managers (at least one of whom was invited to the first union organizational meeting), for technical reasons which could, in good faith, have been disputed by the employer and which affected the claim of majority representation;

6. The results of non-coercive interviews by employer personnel, indicating that a majority of the pharmacists in any appropriate bargaining unit would not have favored the union;

7. The fact, acknowledged by the Board, that the initial demand to bargain was invalid and legally unacceptable because not based on majority representation.[8]

The petitioner's strategy in attempting to isolate these key, undisputed facts is transparent. Petitioner would set aside the substantial evidence which moves toward the good faith of the respondents and would argue solely on the basis of selected portions of the record which it regards as favorable to its petition.

The petition thereby constitutes a rejection of the standard of review set forth by this Court in *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 477-78 (1951). That standard was faithfully followed by the court below.

Construing section 10(e), 61 Stat. 146 (1947), as amended, 29 U. S. C. sec. 160(e) (1964), which was amended in 1947 *to require* the courts of appeals to search substantial *evidence on the whole record*, this Court held:

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. *The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.* This is clearly the significance of the requirement in both statutes [Act sec. 10(e), 61 Stat. 146 (1947), as amended, 29 U. S. C. sec. 160(e) (1964); Administrative Procedure Act sec. 10(e), as amended, 5 U. S. C. sec. 706 (Supp. II, 1967)] that courts consider

[8] Most of these facts were before the employer prior to its rejection of the first invalid demand to bargain.

> the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment." [*Id.* at 487-88. (Emphasis added.)]

Here, the great weight of this contradictory evidence so well substantiates the refusal of the court below to uphold the Board's bargaining order [9] that the Board itself feels constrained to oppose the petition for review. Certainly, under such circumstances, it cannot be said that the court of appeals "misapprehended or grossly misapplied" the standard—which is the only "rare instance" in which this Court will review a finding of the court of appeals based on a review of the substantial evidence on the record considered as a whole. *Id.* at 491.[10]

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[9] The petitioner selects isolated evidence supposedly indicating that the employer's vice-president somehow divined on May 2 that the union would acquire its nineteenth card on May 7. Such reliance is consonant with petitioner's efforts to have this Court retry the facts, based on portion of the record most favorable to its position. For what it was worth, the court below reviewed the testimony referred to along with the remainder of the record.

[10] There is nothing novel in the application by the court below of the substantial evidence rule. The court below did not, as in *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607 (1966), upon which petitioner relies, hold that the Board had *abused its discretion* on the basis of evidence indicating that the Board should have reached a contrary result. *Id.* at 618. Rather, the opinion of the court of appeals reveals that it weighed the *whole record* and found in such record a lack of substantial evidence to support the finding of the Board that the respondents were not in good faith. This is precisely the function which the courts of appeals are expected to perform.

## III. The Petition Raises No Issue as to Which the Courts of Appeals Are in Conflict.

The review by the petitioner, on pages 12 through 17 of its brief, of various decisions of the courts of appeals (many of which support the decision below) reveals the very types of differences in the substantial evidence on the whole record which would predictably yield different results. Therefore, the union's complaint that, in card-check cases, "what is substantial evidence to one reviewing court may be insubstantial to another" (Brief of Petitioner, p. 12) does not fairly account for the fact that variations in the evidence on the issue of good faith is bound to, and indeed should, affect the decision whether to enforce the bargaining order.

Unless this were a "rare instance when the standard [of substantial evidence] appears to have been misapprehended or grossly misapplied," there is no reason for granting the writ. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

Further, there inheres in petitioner's argument with respect to conflict among the courts of appeals, the incorrect assumption that the court below declined to consider evidence of violations of section 8(a) (1) as relevant to the issue of bad faith, and that other courts of appeals have considered such violations in determining good faith or bad faith. The Board itself points out, in its opposition to the petition herein, that the first portion of this assumption is without foundation.[11] Secondly, the

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[11] "[S]ubsequent decisions of the Sixth Circuit make clear that it did not intend to take the position here that other unfair labor practices are irrelevant in determining good or bad faith" (Brief of Board, p. 9). In support of this statement, the Board cites NLRB v. Atco-Surgical Supports, Inc., 57 Lab. Cas. par. 12677 (6th Cir. 1968); NLRB v. Ben Duthler, Inc., 57 Lab. Cas. par. 12709 (6th Cir. 1968); Atlas Engine Works, Inc. v. NLRB, 4 CCH Lab. Rel. Rep. (58 Lab. Cas.) par. 12782 (6th Cir., June 28, 1968).

alleged differences among the courts of appeals in viewing evidence of other violations disappear when one recognizes that not all such violations are of the same nature. In applying the rule of substantial evidence as enunciated by this Court, the various courts of appeals have decided that it is the severity of the violation—the circumstances surrounding it—which determines its evidentiary value on the good faith issue.[12]

A comparison of the questions presented by the union's petition with the criteria established by this Court for the granting of writs of certiorari will be dispositive of the petition. These criteria, as set forth in Rule 19, par. 1(b), do not contemplate that this Court will use the writ to resolve disputed factual questions or to provide unrealistic legal formulas for the resolution of such questions.

## CONCLUSION.

The petition for a writ of certiorari presents no issue warranting review. The petition, therefore, should be denied.

Respectfully submitted,

LEONARD LANE,
ALAN ARNOLD,
LANE, KROTINGER, SANTORA, STONE & PURDY,
*Attorneys for Respondents.*

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[12] The only authority who has not presented "a 'diatribe' against reliance on authorization cards" (Brief of Petitioner, p. 9) admits that the great weight of authority follows this rule of substantial evidence. Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851, 858 (1967). Even the strongest case upon which the union can rely seems to have adopted the standard set forth in the text. See Joy Silk Mills v. NLRB, 185 F. 2d 732, 741-42, 744 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).